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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA B. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.

Petitioners,

v.

AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., and JAMES H. SAMMONS, M.D.

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

		PAGE
Table of Authorities		ii
I.	Introduction	1
II.	This Case Is of Exceptional Importance to the Administration of the Antitrust Laws and Merits Immediate Review by the Supreme Court	2
III.	The Court of Appeals Acknowledged That It Was Departing from the Traditional Rule of Reason Analysis to Allow a Defense Based on Values Independent of Competition	4
IV.	The Court Improperly Held That the *Per Se* Rule Is Not Applicable to the Medical Profession	7
V.	The Respondents' Efforts to Fix the HEW Expert Review Panel Report Is Not Immune from Antitrust Consequences	9
VI.	Conclusion	10

TABLE OF AUTHORITIES

Cases

	PAGE
American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943)	8, 9
Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982)	3, 8
Fashion Originators' Guild of America, Inc. v. F.T.C., 312 U.S. 457 (1941)	7
Jefferson Parish Hospital v. Hyde, 1984-1 Trade Cas. (CCH) ¶ 65,908 (1984)	2, 8, 9
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)	7
Union Processing Corp. v. Atkins, 104 S. Ct. 1316 (1984)	2, 9
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	5

Other Authorities

R. Stern & E. Gressman, *Supreme Court Practice* p. 301 (Fifth Ed. 1978)	3

I. INTRODUCTION

This Court should either sanction or reject major revisions (which this Court has always refused to countenance) in the Rule of Reason and in the *per se* rule, which revisions allow private associations to encroach upon the legislative process and restrict competition in the name of health, safety, and welfare.

The broad legal issue presented by the Petition, and not addressed by the Response, is whether any group of health care providers may (1) target a competitive licensed profession for elimination,[1] (2) implement that goal by a nationwide private[2] boycott, and (3) justify the resulting significant restraint of trade under the Sherman Act by asserting that the boycott was desirable to improve patient care.

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[1] The AMA Board of Trustees, on November 2-3, 1963, organized and funded a Committee, the "prime mission" of which was "first the containment of chiropractic and, ultimately, the elimination of chiropractic." Pet. App. 6, 75.

[2] Petitioners chose to "implement" their "contain and eliminate" plan by using a private boycott because they could not convince any state legislature to reject or retract the license privileges of chiropractors and because petitioners discovered an increasing amount of professional cooperation between chiropractors and petitioners' member physicians. For example: "One of the more surprising items brought to the attention of the Committee is reported to be professional cooperation and association between Doctors of Medicine and these [chiropractors]." PX 174 (1966 letter of AMA Committee to all affiliated medical societies).

The private boycott directly challenged both the state legislatures and all professional and institutional cooperation. For example:

> This is in answer to your letter of December 18 referring to a bill which may be passed in New Mexico that hospitals must accept chiropractors as members of the medical staff.
>
> You are absolutely correct—the unfortunate results of this most ill-advised legislation would be that the Joint Commission would withdraw and refuse accreditation of the hospital that had chiropractors on its medical staff.

PX 10A (letters of JCAH to New Mexico hospital, dated January 9,

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This Court's and other courts of appeals' precedents answer "*No.*"[3] The Seventh Circuit, however, said "*Yes.*" Resolution of the obvious conflict is of great importance to the application of the antitrust laws in the vast and growing health care field and to numerous pending antitrust suits throughout the country.

II. THIS CASE IS OF EXCEPTIONAL IMPORTANCE TO THE ADMINISTRATION OF THE ANTITRUST LAWS AND MERITS IMMEDIATE REVIEW BY THE SUPREME COURT

It is, of course, true, as respondents state, that the court of appeals' ruling is interlocutory. Nevertheless, the unprecedented[4] and clear-cut rulings of the Seventh Circuit are based on an eight-week trial record comprised of eight thousand pages of testimony and hundreds of exhibits. The Seventh

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1973). And as a further example:

> RESOLVED: That MSMS [Michigan State Medical Society] inform its membership that it is considered *unethical* by the AMA and, henceforth, by the MSMS *for a doctor of medicine to refer a patient to a chiropractor for any reason.*

PX 1291 (emphasis added) (dated May 23, 1973). In addition, another example explained, "It might be wise to prohibit any contact of any kind, at any time, by persons at the Medical Center with any chiropractor." PX 1626 (letter of ISMS Chairman to University of Illinois College of Medicine, dated January 11, 1974).

[3] For example, most recently this Court explained, "Thus we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care." *Jefferson Parish Hospital v. Hyde*, 1984-1 Trade Cas. (CCH) ¶ 65,908, n.41 (1984). And, as explained in the three Justice dissent from denial of *certorari* in *Union Processing Corp. v. Atkins*, 104 S.Ct. 1316, 1317 (1984), "We have time and again 'rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.'" See pp. 8-9 *infra*.

[4] Judge Doyle admitted that his ruling departed from the Rule of Reason standard followed by this Court for over 60 years. Pet. App. 24, 31-32.

Circuit painstakingly analyzed that record and neither petitioners nor respondents have quarreled with its factual analysis. The instant dispute is over three well defined, but obviously erroneous, legal rulings.

This Court in the past has granted plenary review of interlocutory decisions that present an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." R. Stern & E. Gressman, *Supreme Court Practice* p. 301 (Fifth Ed. 1978). See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (case reviewed on the basis of summary judgment record alone—before trial but after remand for trial following affirmance of trial court's denial of motion for summary judgment).

Respondents's position that there are no "compelling reasons for granting the writ" (Response at 2) is contradicted by respondents' unsuccessful joint Petition for Rehearing and Suggestion for Rehearing In Banc, at 2-3, in which they stated:

> This petition for rehearing is of exceptional importance because the panel's decision conflicts with the holdings of numerous Supreme Court, Seventh Circuit, and other court of appeals decisions. . . . [T]he panel's decision . . . establishes major new law in this Circuit that will govern numerous other cases as well as the retrial of this case.

Respondent American Academy of Orthopaedic Surgeons was equally emphatic in its separate Petition for Rehearing with Suggestion for Rehearing In Banc, at 2-4. It stated:

> Rehearing of this case by the full Court is necessary because *the proceeding involves legal and factual questions of exceptional importance:*
>
> . . . .
>
> 5. This case is the first of several 'carbon copy' antitrust suits filed by chiropractors against these same defendants to be tried. The decision of this appeal will, therefore, affect not only further proceedings in this case, but the legal standards applicable to disposition of similar claims by other chiropractors presently pending or yet to be filed.

Respondents and petitioners are not alone in their view that this case presents legal issues of exceptional importance. For example, appended hereto is an analysis of the Seventh Circuit opinion in this case, prepared by Walter T. Winslow, Esq., Deputy Director of the Bureau of Competition of the Federal Trade Commission, and presented to the National Health Lawyers Association Seminar in Washington, D.C., on January 25-27, 1984. Reply App. 1-3. Mr. Winslow concludes: that in this case the Seventh Circuit created a special and unnecessary defense to a Rule of Reason violation; that the holding on the unavailability of the *per se* rule was similarly erroneous; and that the decision has the potential to undermine antitrust enforcement in other contexts. *Id.*

Petitioners respectfully suggest that this Court seek the views of the Federal Trade Commission and the Department of Justice on the appropriateness of Supreme Court review at this time and the impact of the decision below on the enforcement of the antitrust laws in the vast and rapidly expanding health care industry.

III. THE COURT OF APPEALS ACKNOWLEDGED THAT IT WAS DEPARTING FROM THE TRADITIONAL RULE OF REASON ANALYSIS TO ALLOW A DEFENSE BASED ON VALUES INDEPENDENT OF COMPETITION

Respondents argue that the Seventh Circuit merely applied "a traditional rule of reason" analysis[5] (Response at 10) to determine whether the challenged conduct was, on balance, anticompetitive.[6] That would be news to the Seventh Circuit.

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[5] The E. Pollack identified as the author of the 1983 article entitled "The Seventh Circuit and the Rule of Reason," referred to on page 11 of the Response, was counsel of record for respondent American Hospital Association through a significant portion of this case.

[6] Respondents contend they submitted evidence that their boycott had procompetitive effects. Response at 3 n. 2, 5 n. 3. This contention is utterly without merit. Respondents' own expert testified: that without the boycott consumers would view chiropractors and medical doctors as offering closely substitutable services; that "ruinous

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The Seventh Circuit candidly and unequivocally admitted that it was departing from the traditional Rule of Reason analysis and modifying that age-old standard to allow a defense, based on a "patient care" motive, for conduct that is, on balance, anticompetitive. Pet. App. 24, 32-35. Specifically, the appellate court held that the single test under the traditional Rule of Reason was "whether the challenged agreement is one that promotes competition or one that suppresses competition." Pet. App. 24. The court, however, concluded that, "in a case involving . . . ethics for the medical profession," it was "free to modify the rule of reason test." Pet. App. 32.

In making that unprecedented "modification," the court held that it was petitioners' burden to initially establish that the effect of respondents' conduct, on balance, was to "restrict competition rather than to promote it." Pet. App. 34. That, of course, is the sum total of the traditional Rule of Reason test.

The court, however, went further and specifically ruled that respondents could "justify [the] significant anticompetitive effect" of their conduct (found under the traditional Rule of Reason analysis) if the respondents could then establish: (1) that they had a genuine concern for patient care; (2) that the concern was objectively reasonable; and (3) that the concern was the dominant motivating factor in respondents' conduct. Pet. App. 34.

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competition" would ensue; and that the chiropractors, because they charge lower fees than the medical doctors, might run the doctors out of the market. It is precisely this sort of conspiracy, designed to avoid "ruinous competition," which the Sherman Act forbids. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221 (1940). Respondents also argue that there is no cross-elasticity of demand between medical doctors and chiropractors. What the trial court record actually establishes is that medical doctors and chiropractors compete for patients, but because insurance companies pay the majority of medical bills, consumers are not price sensitive.

In a convoluted effort to avoid Supreme Court review, respondents deny reality[7] and argue that the Seventh Circuit did not expand the Rule of Reason to allow respondents a "patient care" defense for a manifestly anticompetitive conspiracy (directed specifically at driving a competitive profession out of the health care markets where their members compete—all without approval from any legislature involved in licensing the competitors to deliver health care in those markets). Respondents argue that the new "patient care" defense is actually no more than part of the traditional Rule of Reason analysis, which includes consideration of the history of the restraint, the reasons for adopting the restraint, and the ends to be sought.[8]

This argument ignores the fact (recognized by the Seventh Circuit) that the history of the restraint and reasons for adopting it are pertinent to the Rule of Reason only insofar as they indicate whether an anticompetitive effect will or did occur. See Pet. App. 29-31. The Seventh Circuit held, however, that *after* petitioners prove the existence of an anticompetitive effect under the Rule of Reason, respondents

[7] Respondents, for example, argue that the court rejected a defense based on a "generalized concern for health safety and welfare." Response at 9, 10. This is true, but respondents ignore the fact that the court merely substituted a "patient care motive" for the "generalized public interest motive." Pet. App. 36. The court thus ruled there could be justification for *anticompetitive conduct* based on the patient-care motive.

[8] Respondents argue that the Seventh Circuit found no agreement "to ostracize or boycott [physicians] among them who fail to go along." Response at 6. What the Seventh Circuit actually stated rhetorically was that there was no agreement to ostracize or boycott physicians who failed to go along with an agreement "to fix prices." Pet. App. 17. The Seventh Circuit in this case was operating under the legally erroneous view that price fixing is the only *per se* antitrust violation. Naturally, a physician who is found to be unethical is "ostracized" and the fear of that finding is "compulsion." See, e.g., discussion of PX 880 in Petitioners' Response to Cross-Petition at 3. There was also evidence that medical physicians who dealt with chiropractors were called before their Society's Ethics Committee and that hospitals were threatened with disaccreditation if they dealt with chiropractors. Pet. App. 8-9.

can then "*justify*" or defend the restraint on the basis of a patient-care motive—which the Seventh Circuit correctly acknowledged is "*a value independent of the values attributed to unrestrained competition.*" Pet. App. 34 (emphasis added). The Seventh Circuit therefore did not confine the patient care motive within the analysis of whether competition was restrained, and instead the court created a patient-care defense.

This Court has repeatedly held that there is no such defense—that good motives and concern for public health and welfare cannot justify an injury to competition and are not to be considered as part of the Rule of Reason analysis. *Fashion Originators' Guild of America, Inc. v. F.T.C.*, 312 U.S. 457 (1941); *National Society of Professional Engineers v. United States*, 453 U.S. 679 (1978). Notwithstanding respondents' revisionist view of the opinion below, it is clear that the Seventh Circuit departed from this Court's mandate and intended to and did announce a major change in the antitrust laws. A historic alteration of this sort is of exceptional importance and merits review by this Court.

IV. THE COURT IMPROPERLY HELD THAT THE *PER SE* RULE IS NOT APPLICABLE TO THE MEDICAL PROFESSION.

The court of appeals ruled that no *per se* instruction should be given in this case due to: (1) the presence of a patient-care motive; (2) the fact that the conduct was undertaken by a learned profession; (3) the legal conclusion that only boycotts intended to enforce price fixing agreements are *per se* illegal; and (4) the fact that the boycott was aimed at respondents' competitors rather than consumers.[9] Pet. App. 23-24. Each of those holdings is unprecedented, in conflict with existing law, and dramatically wrong.

Respondents do not even attempt to defend these holdings. Rather, as with their argument concerning the Rule of Reason,

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[9] This holding is particularly bizarre and would lead to the conclusion that a horizontal boycott, intended to eliminate half of the competitors in a relevant market, would escape *per se* condemnation

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they simply misstate the Seventh Circuit's indefensible opinion and pretend that the Seventh Circuit did not say what it clearly intended to and did say. For example, respondents argue that the Seventh Circuit merely held that the factual predicate necessary for the *per se* rule was not established at trial. This is a convenient but erroneous argument, for, *inter alia,* it ignores the reasons given by the Seventh Circuit for reaching its conclusion, *i.e.,* "because the evidence of the 'patient care motive' required that a rule of reason analysis be applied," because the case arose "in the context of a profession," and because compulsion was only exerted upon medical doctors and facilities and chiropractors, not consumers. Pet. App. 23.

Each of these holdings represents a clear departure from Supreme Court and other court of appeals precedent. In *Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332 (1982), this Court applied a *per se* rule to the medical profession. Even more recently, in *Jefferson Parish Hospital v. Hyde,* 1984-1 Trade Cas. (CCH) ¶ 65,908, n.41, n.42 (1984), this Court not only confirmed that *per se* rules could be applied to the medical profession, but also specifically rejected a district court ruling that the *per se* rule was inappropriate due to the existence of a patient-care motive;

> Conversely, with such evidence [of market power over the tying product] the *per se* rule against tying may apply. Thus we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purposes of improving *patient care*.... In the past, we have refused to tolerate manifestly anticompetitive conduct simply because the health care industry is involved.

(emphasis added) (citing, *inter alia, American Medical Ass'n v.*

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because it was not directed at consumers or at competitors who dealt with consumers in particular ways. Petitioners are aware of no court, other than the Seventh Circuit in the decision below, which has ever so held.

United States, 317 U.S. 519, 528-29 (1943)). And in *A.M.A. v. U.S.*, 130 F. 2d 233, 248 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943), the court of appeals told the A.M.A. itself:

> There is a very real difference between the use of such self-discipline and *an effort on the part of such association to destroy* competing professional or business groups or organizations.

It is noteworthy that *Hyde* did not involve an agreement to fix prices or enforce a price-fixing agreement—yet the efficacy of the *per se* rule was sustained. Indeed, this Court in *Hyde* specifically affirmed that a *per se* violation is made out where defendants have "concertedly refused to deal with non-members of an association." 1984-1 Trade Cas. at 67,899 n. 10.[10] The Seventh Circuit rulings are in direct conflict with these holdings of this Court.

V. THE RESPONDENTS' EFFORTS TO FIX THE HEW EXPERT REVIEW PANEL REPORT IS NOT IMMUNE FROM ANTITRUST CONSEQUENCES

The trial court refused a proper instruction to the jury relating to evidence of the "fix" of the HEW Expert Review Panel report (Pet. App. 61) and, instead, gave two instructions (Pet. App. 59, 60) that removed any fraudulent activity or fix by respondents from antitrust consideration by the jury if the "fixers" were "sincere" in their efforts to use the fixed agency report to ultimately influence legislation. The Seventh Circuit affirmed. The instructions given ignored both the fraud on the agency and the extensive use made of the tainted report in the private boycott. They are so clearly wrong that respondents do not even attempt a logical defense of the court of appeals' action concerning these instructions. Petitioners stand on their argument on this point presented in their main brief.

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[10] In *Union Processing Corp. v. Atkins*, 104 S. Ct. 1316 (1984), this Court denied *certiorari*, and Mr. Justice White, joined by the Chief Justice and Mr. Justice Powell, filed a dissenting opinion. Justice White pointed out that a horizontal agreement to allocate territories was a classic example of a *per se* violation and stated: "We have time and again rejected the notion that naked restraints of trade are to be tolerated because they are *well intended or because they are allegedly developed to increase competition.*" *Union Processing*, 104 S. Ct. at 1317.

VI. CONCLUSION

Petitioners believe, and in their Petitions For Rehearing *In Banc* respondents agreed and vigorously urged, that this case is of exceptional importance to the application of the antitrust laws in the health care field and in this and other pending cases and that the ruling of the Seventh Circuit is in direct conflict with numerous decisions of this Court and other circuit courts of appeal.

Does the *per se* rule apply to horizontal group boycotts in the health care field? May a conspiratorial effort to eliminate a licensed competitive health care profession through a group boycott be excused if the perpetrators can prove a "patient care" motive?

This case involves clear-cut legal issues and is precisely the type of case that ought to be decided at this juncture by the Supreme Court. Accordingly, petitioners request that their Petition for Writ of *Certiorari* be granted.

Respectfully submitted,

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